

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking to
Consider Regulating
Telecommunications Services Used by
Incarcerated People.

Rulemaking 20-10-002

**OPENING COMMENTS OF THE PUBLIC ADVOCATES OFFICE ON THE
ORDER INSTITUTING RULEMAKING TO CONSIDER REGULATING
TELECOMMUNICATIONS SERVICES USED BY INCARCERATED PEOPLE**

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TABLE OF CONTENTS

| | <u>PAGES</u> |
|--|---------------------|
| I. INTRODUCTION AND SUMMARY | 1 |
| II. DISCUSSION..... | 2 |
| A. Question 1 Response: Yes, the Commission Should Exercise its Authority to Regulate the Companies that Provide Telecommunications Services to Incarcerated People in California | 2 |
| 1. Regulation of IFCS Companies is Currently Lacking | 2 |
| 2. High Costs for IFCS Have Many Negative Impacts on Incarcerated People | 5 |
| 3. The Commission Should Apply Service Quality Standards for IFCS..... | 7 |
| 4. The Market for IFCS is Highly Concentrated and Incarcerated People Cannot Choose Providers | 7 |
| 5. The Ongoing COVID-19 Pandemic has a Disproportionate Impact on Incarcerated People | 9 |
| B. Question 2 Response: Yes, the Commission Should Set Rate Caps for ICFS Intrastate Calling, Including Video Calls..... | 10 |
| 1. The Commission Should Evaluate the Rate Caps for ICFS set by the FCC and Other States | 10 |
| 2. The “Commission Fee” Structure Increases the IFCS Rates | 12 |
| C. Question 3 Response: Yes, the Commission Should Limit the Types of Additional Fees Providers Can Charge Users of IFCS | 14 |
| D. Question 4 Response: Yes, the Commission Should Act to Protect the Needs of Incarcerated People with Disabilities | 17 |
| E. Additional Issues: The Commission Should Review IFCS Companies’ Privacy Policies and Practices..... | 20 |

| | |
|-----------------------------|-----------|
| III. CONCLUSION..... | 21 |
|-----------------------------|-----------|

I. INTRODUCTION AND SUMMARY

Pursuant to Rule 6.1 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, the Public Advocates Office at the California Public Utilities Commission ("Cal Advocates") submits these opening comments on the *Order Instituting Rulemaking ("OIR") to Consider Regulating Telecommunications Services on Incarcerated People*.¹

The Rulemaking invites parties to respond to four specific questions to determine whether the Commission "should regulate the rates, terms, and conditions of telecommunications services provided to incarcerated people in California to ensure that they are just and reasonable."² Unless otherwise noted, this document refers to these services as Incarceration Facility Calling Services ("IFCS").

The Commission recognizes that telecommunications companies charge unreasonable, unjust, and exorbitant rates to people in California's incarceration facilities. Although the Federal Communications Commission ("FCC") has an ongoing rulemaking on the subject of rates for telephone service for people who are incarcerated,³ the FCC's jurisdiction is limited to interstate calls, which only account for about 10 percent of phone calls from these facilities.⁴ Unreasonable and unjust rates are exacerbated during the COVID-19 pandemic because people who are incarcerated must use telephone services to communicate with their families because of the limitation on in-person visitation.

¹ Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People (OIR), R.20-10-002, October 8, 2020, p. 1.

² OIR at pp. 6-7.

³ Notice of Proposed Rulemaking, FCC 12-167, In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, December 28, 2012. <https://www.fcc.gov/document/rates-interstate-inmate-calling-services-0>.

⁴ Sawyer, Wendy. 2019. "Why Expensive Phone Calls Can Be Life-Altering for People in Jail – and Can Derail the Justice Process." Prison Policy Initiative. February 5, 2019. <https://www.prisonpolicy.org/blog/2019/02/05/jail-phone-calls/>.

Cal Advocates urges the Commission to take action to regulate the rates, terms, and conditions of telecommunications services in incarceration facilities, to ensure rates for these services are just and reasonable.

II. DISCUSSION

A. Question 1: Should the Commission exercise its authority to regulate the companies that provide those telecommunications services to incarcerated minors and people in California and, if so, how?

Response: Yes, the Commission Should Exercise its Authority to Regulate the Companies that Provide Telecommunications Services to Incarcerated People in California

The OIR asks whether the Commission should exercise its authority to regulate the companies that provide telecommunications services to incarcerated people in California.⁵ Yes, the Commission should exercise its authority and regulate the companies that provide telecommunications services to adults and minors who are incarcerated in California. As noted in the OIR, the Commission has the statutory authority under the California Constitution Article XII, § 3 and 6 and several Public Utility (“Pub. Util.”) Codes including § 216, § 233, § 234, to ensure the rates, terms, and conditions of intrastate Incarceration Facility Calling Services (“IFCS”) are just and reasonable.⁶ The Commission also must exercise its authority to regulate these companies in order to assess and address multiple concerns, which are described below.

1. Regulation of IFCS Companies is Currently Lacking

Calling services in incarceration facilities are typically provided by private telecommunications companies under contract with the entity that oversees or owns the facility. While incarceration facilities may be owned or operated, either in whole or in

⁵ OIR at p. 7.

⁶ OIR at pp. 1-2.

part, by a private company, the facilities still are ultimately governed under contract with federal, state, county, or city government entities. Most federal incarceration facilities are overseen by the federal Bureau of Prisons, which operates approximately nine federal prisons in California. Other federal incarceration facilities in the state include military prisons as well as detention camps operated by Immigration and Customs Enforcement (“ICE”). Each agency maintains their own contracts with IFCS companies.

The State of California incarcerates individuals in state prisons, a few juvenile facilities, one Community Correctional facility,⁷ and 43 “Conservation Camps,” where incarcerated people serve as a source of low-paid labor to support the state’s response to emergencies such as fires, floods, and other natural or manmade disasters. These state facilities are overseen by the California Department of Corrections and Rehabilitation (“CDCR”). CDCR provides calling services to people who are incarcerated in CDCR facilities through a single statewide contract with the company Global Tel Link (“GTL”).⁸

County or municipal governments oversee most of the state’s jails and juvenile facilities. In California, 58 county sheriffs and probation chiefs negotiate their contracts independently with these companies.⁹ According to an analysis of Senate Bill 555 (2020)¹⁰, “in part due to the lack of regulation of these contracts, private companies are charging unaffordable rates and fees for communications and commissary items.”¹¹

Although the FCC has made some progress on the issue of high calling costs by setting interstate rate caps, an estimated 90 percent of calls to and from incarceration facilities are *intrastate*. The FCC’s rate caps do not apply to these calls. In part because

⁷ CDCR. “Facility Locator.” Accessed October 22, 2020. <https://www.cdcr.ca.gov/facility-locator/>.

⁸ CDCR. n.d. “Receiving Calls from Inmates and Wards.” Visitation Information. Accessed October 22, 2020. <https://www.cdcr.ca.gov/visitors/receiving-calls-from-inmates-and-wards/>.

⁹ Senate Bill (SB) 555 (Mitchell) As Amended, *Assembly Floor Analysis*. August 24, 2020.

¹⁰ I WOULD GIVE THE STATUS OF THE BILL. YOU DO SO LATER, BUT IT SHOULD BE UP FRONT IN MY VIEW.

¹¹ SB 555 *Assembly Floor Analysis*, 2020.

of this lack of oversight, a 15-minute in-state call from a California jail costs, on average, 2.8 times more than the same in-state call from a California prison,¹² and the cost can vary considerably from county to county.¹³ **Table** below demonstrates show how much more California jails are charging than state prisons for the same 15 minute in-state phone call.

Table 1: Cost Comparison for In-State Calls from Prisons and Jails in California, 2018¹⁴

| Highest Cost of a 15 minute in-state phone call from a California jail | Average cost of a 15 minute in-state call from a California jail | Average cost of a 15 minute in-state call from a state prison | How many times higher the average jail rate is compared to the state prison's rate |
|--|--|---|--|
| \$17.80 | \$5.70 | \$2.03 | 2.8 |

Based on this table, it is clear given the absence of state regulation IFCS services have resulted in incarcerated people and their families and loved ones having to pay unreasonable rates. As discussed later in these comments, the high cost of service is made up of multiple components including per-minute charges as well as a myriad of administrative fees. The Commission should exercise its authority by setting rate caps for intrastate phone and video services used by people incarcerated in California.

Rate regulation of local facilities is especially important because the cost of communications services affects the incarcerated people and their families and loved ones differently. On a given day, three out of four people held in jails nationally have not been convicted or sentenced.¹⁵ The vast majority of incarcerated people are being held

¹² Wagner, Peter, and Alexi Jones. 2019. "State of Phone Justice." Prison Policy Initiative, February 2019. https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

¹³ OIR at p.4.

¹⁴ Wagner and Jones. 2019.

¹⁵ Sawyer, Wendy, and Peter Wagner. 2020. "Mass Incarceration: The Whole Pie 2020." Prison Policy Initiative. <https://www.prisonpolicy.org/reports/pie2020.html>.

pretrial, and many will remain incarcerated unless they can make bail. Charging a high cost for these calls punishes incarcerated people, many of whom have not yet been convicted of a crime, and drives up costs for their appointed public counsel, and makes it harder for them to contact family members and others who might help them post bail or build their defense.

2. High Costs for IFCS Have Many Negative Impacts on Incarcerated People

The high costs for IFCS have negative impacts on incarcerated people and their families. Approximately one-third of families with incarcerated loved ones go into debt as a result of the high costs of phone calls and visits.¹⁶ IFCS costs fall most heavily on the families of incarcerated people and fall disproportionately on low-income women of color.¹⁷ Incarcerated people often lose connection with their loved ones because of the high costs of phone calls, which can negatively affect the incarcerated person's mental health and frustrate their ability to prepare for trial or reentry.¹⁸

As mentioned above, high intrastate IFCS costs also can drain already scarce resources from public defenders' ("PD") offices as PD offices typically pay for phone calls from clients in county jails.¹⁹ In a 2013 letter to the FCC, the Missouri State Public Defender System stated that it spends over \$75,000 per year on high ICFS costs for their clients in incarceration.²⁰ Even more disturbingly, the letter goes on to state that this high cost of service forces the PD office to limit the number of collect calls it receives from

¹⁶ Senate Bill (SB) 555 (Mitchell) As Amended, *Assembly Floor Analysis*. August 24, 2020.

¹⁷ SB 555 *Assembly Floor Analysis*. August 24, 2020.

¹⁸ SB 555 *Assembly Floor Analysis*. August 24, 2020.

¹⁹ Wendy Sawyer. 2019. "Why Expensive Phone Calls Can Be Life-Altering for People in Jail – and Can Derail the Justice Process." Prison Policy Initiative (blog). February 5, 2019. <https://www.prisonpolicy.org/blog/2019/02/05/jail-phone-calls/>.

²⁰ Letter to Federal Communications Commission RE: In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Missouri State Public Defender System, January 29, 2013.

<https://ecfsapi.fcc.gov/file/7022120520.pdf>.

their clients.²¹ The experience of the Missouri State PD office is common for PD offices across the nation²² and there is no evidence that California's PD offices are any better off than Missouri's. High IFCS costs reduce the PDs' ability to communicate with clients, diminishes the quality of representation, and thus risks affecting clients their constitutional right to counsel.²³ The Commission should exercise its authority over intrastate IFCS to ensure just and reasonable rates.²⁴

Ensuring incarcerated people have access to affordable IFCS also has several positive public interest benefits. Studies have shown that family contact during incarceration reduces recidivism and allows incarcerated parents to be more present for the 2.7 million children nationwide who suffer when a parent cannot afford to keep in touch.²⁵ A 2018 report by the Department of Justice found that approximately 77 percent of individuals released from prison were rearrested within five years in the United States.²⁶ Of the people who do find success and reintegrate after release, many credit phone contact and family support during their incarceration for their rehabilitation.²⁷ The Commission should exercise its authority to regulate intrastate IFCS to ensure intrastate IFCS rates are just and reasonable.

²¹ Letter to Federal Communications Commission RE: In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Missouri State Public Defender System, January 29, 2013.

<https://ecfsapi.fcc.gov/file/7022120520.pdf>.

²² Wendy Sawyer. 2019. "Why Expensive Phone Calls Can Be Life-Altering for People in Jail – and Can Derail the Justice Process." Prison Policy Initiative (blog). February 5, 2019.

<https://www.prisonpolicy.org/blog/2019/02/05/jail-phone-calls/>.

²³ Wendy Sawyer. 2019. "Why Expensive Phone Calls Can Be Life-Altering for People in Jail – and Can Derail the Justice Process." Prison Policy Initiative (blog). February 5, 2019.

<https://www.prisonpolicy.org/blog/2019/02/05/jail-phone-calls/>.

²⁴ Public Utilities Codes §§ 216, 233, 234.

²⁵ U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2013 at p. 1.

<http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5109>.

²⁶ Mariel Alper, Matthew R. Durose, and Joshua Markman. 2018. "2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)." US Department of Justice: Bureau of Justice Statistics.

<https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266>.

²⁷ *Second Report and Order and Third Further Notice of Proposed Rulemaking*, FCC-15-136 at pp. 3-5.

3. The Commission Should Apply Service Quality Standards for IFCS

The Commission should require and ensure IFCS providers meet the Commission's service quality standards. Articles, reports, and website reviews suggests that IFCS service quality in California prisons is generally very poor or inconsistent.²⁸ For example, visitors of a Fairfield County, Ohio Prison have complained that "[t]he line crackled; the picture was grainy. I spent several conversations mostly shouting."²⁹ Service quality issues are exacerbated for incarcerated people because the technology used in these facilities often is old and aging, while the lack of market competition and regulation allows providers to ignore issues.³⁰ Furthermore, ICFS companies nationally typically do not provide refunds to customers experiencing bad phone call connections.³¹

The Commission should examine the service quality of intrastate IFCS. The Commission's General Order ("G.O.") 133-D establishes the Commission's telecommunications service quality standards and reporting requirements.³² Through this proceeding, the Commission should establish service quality standards specifically for intrastate IFCS and determine which elements of G.O. 133-D should apply to ICFS.

4. The Market for IFCS is Highly Concentrated and Incarcerated People Cannot Choose Providers

Because people who are incarcerated do not have a choice regarding their phone service provider, IFCS companies are, effectively monopolies with the incentive and ability to charge exorbitant rates. In addition, beginning in the 1990's, the IFCS market

²⁸ See https://www.consumeraffairs.com/cell_phones/global_tel_link.html for Global Tel Link for user reviews.

²⁹ When Prisoners Are a 'Revenue Opportunity,' Brian Alexander, The Atlantic, August 10, 2017. <https://www.theatlantic.com/business/archive/2017/08/remote-video-visitation/535095/>.

³⁰ *Second Report and Order and Third Further Notice of Proposed Rulemaking*, FCC-15-136 at pp. 3-5.

³¹ The terms and conditions for Securus Video Connect SM Services states, "Securus is not responsible for disconnects due to behavior issues, disconnects initiated by the correctional facility, or disconnects due to Internet connection or hardware malfunctions." (<https://securustech.net/friends-and-family-terms-and-conditions/index.html#tc3>).

³² See General Order 133-D, Public Utilities Commission of the State of California, *Rules Governing Telecommunications Services*.

has increasingly become consolidated and concentrated, and today the industry is primarily served by only two major corporations – Global Tel Link (“GTL”) and Securus Technologies (“Securus”).³³ The Prison Policy Initiative in the 2014 research suggested more than 90 percent of all domestic calls in jails and prisons were intrastate, which are not regulated by the FCC.³⁴ In this Rulemaking, the Commission has committed to take up the call from the FCC to “address the egregiously high intrastate inmate calling services rates” and to ensure that incarcerated people in the state pay just and reasonable rates.³⁵

As mentioned previously, IFCS companies provide incarceration facilities bundled packages of other services, such as video calling, electronic tablets, and money transfer for commissary accounts, which enables IFCS companies to hide the true cost of phone services from regulators and facilities and make it more difficult for facilities to change vendors. As stated in an analysis of SB 555, providers of phone services to incarceration facilities, “...have learned how to take advantage of local government contracting, drafting self-serving contracts, while jail staffs with fewer resources are at a disadvantage in negotiations.”³⁶ Bundling packages of other services also “locks in” contracts by making it more difficult for the facility to change vendors for multiple types of services provided by their IFCS vendor.³⁷ For example, when the Orange County Board of Supervisors discovered GTL had violated inmate privacy more than 1,000 times, the board still voted to extend GTL’s contract up to 2018, citing the difficulty of changing vendors and noting that “other vendors in the industry also have faced problems.”³⁸

³³ Wagner and Jones, 2019.

³⁴ Sawyer, 2019.

³⁵ OIR at pp. 4 and 6.

³⁶ SB 555 *Assembly Floor Analysis*, 2020.

³⁷ Wagner and Jones, 2019.

³⁸ The Board also delegated authority over the contract to the Orange County Sheriff’s Department, even though the Department had been accused of conspiring with GTL to record and listen to the phone calls.

(continued on next page)

The Commission should ensure IFCS companies providing intrastate calling services to people who are incarcerated are not able to use their monopoly power to impose unfair rates or contracts in an industry with very limited, if any, competition.

5. The Ongoing COVID-19 Pandemic has a Disproportionate Impact on Incarcerated People

The COVID-19 pandemic is shifting personal interactions from in-person to telephonic, including incarcerated people and their families and loved ones, with many wide-reaching societal implications. The Marshall Project has found that people in incarceration are far more likely to contract COVID-19 than the average person in California. There have been 15,187 cases of COVID-19, or 1,560 cases per 10,000 people in incarceration, in California as of October 15, 2020, an infection rate **663 percent higher** than California overall.³⁹ Due to the increase of COVID-19 cases, CDCR has canceled normal visitation to incarcerated people in, statewide, until further notice.⁴⁰ This forces incarcerated people in to use egregiously-expensive telephone services to keep in contact with their families and legal defense teams. Exorbitant IFCS rates have placed significant, undue burden on incarcerated people when they need to stay connected with family and loved ones, most especially during this unprecedented pandemic. The Commission must recognize that the ongoing COVID-19 pandemic exacerbates the high cost of IFCS.

(Fry, Hannah. 2018. "O.C. Supervisors Extend Contract with Vendor at Center of Scandal over Jailhouse Recordings." Los Angeles Times, November 8, 2018. <http://www.latimes.com/local/lanow/la-me-ln-gtl-contract-extension-20181107-story.html>.)

³⁹ *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project, updated October 16, 2020, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

⁴⁰ Visitation Information, California Department of Corrections and Rehabilitation, viewed October 19, 2020. <https://www.cdcr.ca.gov/visitors/>.

B. Question 2: Should the Commission set rate caps for intrastate calling for incarcerated people, including video calls?

Response: Yes, the Commission Should Set Rate Caps for ICFS Intrastate Calling, Including Video Calls

The OIR asks whether the Commission should set rate caps for intrastate calling for incarcerated people, including video calls.⁴¹ Yes, for all the reasons described in the previous section, the Commission should set rate caps for intrastate ICFS calling, including video calls.

1. The Commission Should Evaluate the Rate Caps for ICFS set by the FCC and Other States

When setting rate caps on intrastate service, the Commission should consider how the FCC established its rate caps for interstate service. For example, the FCC adopted rate tiers based on the relative size of the incarceration facility using the Average Daily Population (ADP) of the incarceration facility creating the following tiers: 0-349, 350-999, and 1,000 and greater.⁴² The FCC found that these tiers most closely resemble the breakdown between small-to-medium, large, and very large, or mega-incarceration facilities, and used marketplace evidence to determine the rates for each of these tiers.⁴³ From this, the current interstate rate caps are as follows:⁴⁴

- 11 cents/minute for debit/prepaid calls, in state or federal prisons.
- 14 cents/minute for debit/prepaid calls in jails with 1,000 or more inmates.
- 16 cents /minute for debit/prepaid calls in jails with 350-999 inmates.
- 22 cents /minute for debit/prepaid calls in jails of up to 349 inmates.

⁴¹ OIR at p. 7.

⁴² Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC-15-136 at p. 24.

⁴³ *Id.*

⁴⁴ Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC-15-136 at p. 25.

- Rates for collect calls are slightly higher in the first year and will be phased down to these caps after a two-year transition period.

The Commission also should consider what other states have done to lower rates on intrastate calling when setting rate caps for IFCS calling. Specifically, 5 states⁴⁵ have prohibited or restricted Commission Fees, which are a percentage of calling revenue owed back to incarceration facilities. Commission Fees and their implications on cost of service are explained in more detailed in subsequent sections of these comments. . For example, the Public Utilities Commission of Ohio eliminated site Commission Fees and reduced intrastate calling rates by 75 percent to \$0.05 per minute for Ohio Department of Rehabilitation and Correction facilities.⁴⁶ West Virginia's Division of Corrections recently reviewed bids without regard to site Commission Fees offered by the bidders (i.e., the Department of Corrections (DOC) did not take site Commission Fees into account in deciding the winning bidder).⁴⁷ The New Jersey Board of Public Utilities recently awarded a contract for state prisons that eliminated site Commission Fees and reduced rates below \$0.05 per minute.⁴⁸ Similarly, in New Hampshire, the state DOC lowered intrastate rates to less than \$0.06 per minute with a 20 percent site Commission Fee.⁴⁹ The fact that IFCS providers bid against each other for these contracts with incarceration facilities suggest that efficient IFCS providers can provide intrastate calling at rates closer to \$0.05 per minute – less than half of the FCC's lowest rate cap of \$0.11 per minute. It is unlikely that any IFCS provider would offer service at a rate of \$0.05

⁴⁵ Ohio, West Virginia, New Jersey, Pennsylvania, and New Hampshire.

⁴⁶ See Letter from Bernadette Rabuy, Policy and Communications Assoc., Prison Policy Initiative, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, p. 1.

⁴⁷ See Letter from Chérie Kiser, Counsel to GTL, to Marlene Dortch, Secretary, FCC, WC Docket No. 12-375, p. 3.

⁴⁸ Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC-15-136 at p. 25.

⁴⁹ See HRDC Second FNPRM Comments at 6.

per minute if that rate did not cover the cost of service including profit, which further suggests that current intrastate calling costs may be inflated.⁵⁰

Additionally, the Commission should consider the goals and suggested rate caps found in SB 555 which would have capped rates for telephone communications at \$0.05 per minute and for video communications at \$0.25 per minute.⁵¹ Further, the Commission should consider using the FCC's tiered rate structure, while also using other states as a reference for what the just and reasonable cost of intrastate calling can be.

2. The “Commission Fee” Structure Increases the IFCS Rates

While determining appropriate rate caps for intrastate IFCS, the Commission should assess how “Commission Fees” – compensation that intrastate IFCS providers pay to state and local incarceration facilities, including California⁵² – raises IFCS intrastate rates. These Commission Fees typically are set as a percentage (either variable or fixed) of gross calling revenue generated by intrastate IFCS providers. For example, if the ICFS provider generated \$200 in intrastate revenue from the sale of per-minute calling services in a state or local incarceration facility and that facility had a contract stipulating a 40 percent Commission Fee, the IFCS provider would owe the incarceration facility \$80 in Commission Fees. Commission Fees lower the net revenue for IFCS providers, which translates to higher per-minute rates and higher additional fees to cover the cost of providing service.⁵³ Commission Fees are individually negotiated in the contracts between the IFCS providers and the incarceration facilities and can vary at the local,

⁵⁰ Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC-15-136 at p. 25.

⁵¹ SB 555, September 3, 2020, Senator Mitchell with Assembly Members Medina and Wicks. https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB555. Vetoed by Governor Newsom on September 30, 2020.

⁵² Wagner and Jones, 2019.

⁵³ Comments of CenturyLink, In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, March 25, 2013 at p. 14.

county, state, and federal levels. These fees can be as much as **84.1 percent**⁵⁴ of the gross revenue from calling services, as seen in Baldwin County, Alabama.⁵⁵

In its 2013 comments to the FCC, CenturyLink provided an example of how eliminating Commission Fees could reduce the per-minute and average cost of calling for persons in incarceration:⁵⁶

At the Michigan DOC [Department of Corrections] in mid-2008, commissions were eliminated from a prior level of 50.99%:

- Prior rates that were set by Michigan to achieve certain internal objectives were a somewhat complex mixture of local versus long distance and day versus evening discounts, with an average cost per call of approximately \$5.30.

- Subsequent rates were reduced to between \$.10 and \$.12 per minute for intrastate calls and between \$.12 and \$.15 per minute for interstate calls, with an average cost per call of approximately \$1.10.

The revenue from Commission Fees may be used for any purpose by incarceration facilities, although many claim that these funds go directly to funding programs for rehabilitation and education of persons in incarceration.⁵⁷ In SB 555, Governor Newsom supported the goal of lowering the cost of IFCS services, but vetoed the bill because of his concern that prohibiting Commission Fees could have unintended consequences on the funding of rehabilitation and education programs for people in incarceration.⁵⁸ When the Commission regulates intrastate IFCS rates, it should assess the impact of

⁵⁴ That is, 84.1 percent of gross revenue from the ICS company would be paid back to the county.

⁵⁵ “Exhibit 2: ICSolutions Inmate Telephone Services Agreement with Baldwin County, Alabama,” Prison Policy Initiative, January 16, 2013 at p. 12. https://www.prisonpolicy.org/phones/Exhibit_48.pdf.

⁵⁶ Comments of CenturyLink, In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, March 25, 2013 at p. 15.

⁵⁷ FCC 13-113, Report an Order and Further Notice of Proposed Rulemaking, WC. Docket No. 12-375, September 26, 2013, ¶ 57 at pp. 31-32. <https://www.fcc.gov/document/fcc-releases-order-reducing-high-inmate-calling-rates>.

⁵⁸ Veto of SB 555, Governor Gavin Newsom, September 30, 2020. <https://www.gov.ca.gov/wp-content/uploads/2020/09/SB-555.pdf>.

Commission Fees on the per-minute rates for IFCS because Commission Fees may be a significant portion of the underlying rate.

C. Question 3: Should the Commission limit the types of additional fees providers can charge users of calling services for incarcerated people?

Response: Yes, the Commission Should Limit the Types of Additional Fees Providers Can Charge Users of IFCS

The OIR asks whether the Commission should limit the types of additional fees providers can charge users of calling services for incarcerated people.⁵⁹ Yes, the Commission should regulate the additional fees that IFCS companies charge incarcerated people and limit both the price and variety of additional fees charged. The Code of Federal Regulation (“CFR”) defines additional fees, otherwise known as “Ancillary Charges” as “...any charge Consumers may be assessed for the use of Inmate Calling services that are not included in the per-minute charges assessed for individual calls.”⁶⁰ These fees may include automated payment fees, fees for single-calls and related services, live agent fees, bill statement fees, and third party financial transaction fees. In addition to these ancillary fees, there may be a per-call or per-connection fee;⁶¹ authorized fees, which are government authorized but not mandatory;⁶² mandatory taxes and or fees which IFCS providers are required to charge by government;⁶³ and possibly other, as of yet undiscovered, fees.

In 2015, the FCC found that, by some estimates, these additional fees make up as much as **38 percent** of the total customer payments to IFCS companies.⁶⁴ The FCC also

⁵⁹ OIR at p. 7.

⁶⁰ 47 CFR § 64.6000(a).

⁶¹ 47 CFR § 64.6000(o).

⁶² 47 CFR § 64.6000(b).

⁶³ 47 CFR § 64.6000(n).

⁶⁴ FCC 15-136, Second Report and Order and Third Further Notice of Proposed Rulemaking, In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Federal Communications Commission, November 5, 2015, ¶144 at p. 77.

stated that “[t]he sheer number of ancillary service charges, their varying nomenclature, and the variability of the amounts charged make for a confusing system.”⁶⁵ Additional fees come in two broad categories: incremental fees related to individual calls and administrative fees related to the customer’s account with the IFCS provider.

Incremental fees may include a fee to connect/initiate a call as well as the mandatory and optional taxes, fees, and surcharges that are charged on a per-call basis or as a percentage of intrastate revenue from calls. In its 2013 report on the state of the incarcerated phone industry, the Prison Policy Initiative compiled a list of some of the incremental and administrative fees that IFCS providers charge on a national level.⁶⁶ For example, GTL listed four fees, the “Federal Regulatory Cost Recovery Fee,” “Public Telephone Surcharge,” “Single Bill Fee,” and “Validation Surcharge.”⁶⁷ Securus listed five fees, “Bill Processing Charge,” “Billing Statement Fee,” “Federal Regulatory Recovery Fee,” “USF Administrative Fee,” and “Wireless Administrative Fee.”⁶⁸

Overall, it is difficult to discern which, if any of these fees are mandated by the government, and which are worded to look like they are mandated by the government. While on a national level, each IFCS company has some “Federal Recovery” fee, each IFCS company also has a swath of other fees with no clear correlation between companies, which suggests they are not governmentally mandated. Furthermore, it is unclear if these fees are charged per call or per month.

Administrative fees may include fees to open an account, monthly fees to maintain an account, fees to add money to an account, fees to take money out of an account, and

⁶⁵ FCC 15-136, Second Report and Order and Third Further Notice of Proposed Rulemaking, In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Federal Communications Commission, November 5, 2015, ¶144 at p. 77.

⁶⁶ “Exhibit 48,” Prison Policy Initiative, Aleks Kajustura, April 19, 2013.
https://www.prisonpolicy.org/phones/Exhibit_48.pdf.

⁶⁷ “Exhibit 48,” Prison Policy Initiative, Aleks Kajustura, April 19, 2013 at p. 2.
https://www.prisonpolicy.org/phones/Exhibit_48.pdf.

⁶⁸ “Exhibit 48,” Prison Policy Initiative, Aleks Kajustura, April 19, 2013 at p. 9.
https://www.prisonpolicy.org/phones/Exhibit_48.pdf.

fees to close an account.⁶⁹ These fees may vary depending on the incarceration facility even when they are served by the same IFCS provider. For example, GTL listed three main “ancillary” fees in a 2020 report to the FCC. **Table** shows the ancillary fees charged by GTL to adults and juveniles in incarceration in Alameda County, CA in 2019.

Table 2: GTL Ancillary Fees Charged to Incarcerated Adults and Juveniles in Alameda County, CA in 2019⁷⁰

| Ancillary Fee | Cost for Adults | Cost for Juveniles |
|---|-----------------|--------------------|
| Automated Payment Fee | \$3.00 | \$3.00 |
| Live Agent Fee | \$5.95 | \$5.95 |
| 3 rd Party Financial Transaction Fee | \$0.01-6.95 | \$0.01-6.95 |

In another example, GTL charges people who are incarcerated by the California Department of Corrections and Rehabilitation \$3 for automated payment and live agent fees while GTL charges people who are incarcerated in Contra Costa County, CA jails no fees for automated payments or live agents whatsoever.⁷¹ Cal Advocates reviewed these reports on the FCC’s website but could not determine if these fees are annual, monthly, or per call due to the redacted nature of the reports. These fees, however, are arbitrarily priced, and the Commission should regulate them. Administrative fees are an appealing way to increase revenues for IFCS providers since they generally fall outside of the gross revenue counted towards “commission” fees and thus, 100 percent of administrative fee

⁶⁹ “Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry”, Prison Policy Institute, Drew Kukorowski, Peter Wagner, Leah Sakala, May 8, 2013. <https://www.prisonpolicy.org/phones/pleasedeposit.html#costoffees>.

⁷⁰ “REDACTED – GTL ICS Annual Report for 2019 (filed 4-1-2020).XLSX”, tab “III. Anciliary Fees” (*sic*), cells E19-24. [https://ecfsapi.fcc.gov/file/1040158098099/REDACTED%20-%20GTL%20ICS%20Annual%20Report%20for%202019%20\(filed%204-1-2020\).XLSX](https://ecfsapi.fcc.gov/file/1040158098099/REDACTED%20-%20GTL%20ICS%20Annual%20Report%20for%202019%20(filed%204-1-2020).XLSX).

⁷¹ “REDACTED – GTL ICS Annual Report for 2019 (filed 4-1-2020).XLSX”, tab “III. Anciliary Fees” (*sic*), cells E121-123 and E307-309 respectively. [https://ecfsapi.fcc.gov/file/1040158098099/REDACTED%20-%20GTL%20ICS%20Annual%20Report%20for%202019%20\(filed%204-1-2020\).XLSX](https://ecfsapi.fcc.gov/file/1040158098099/REDACTED%20-%20GTL%20ICS%20Annual%20Report%20for%202019%20(filed%204-1-2020).XLSX).

revenue goes to the provider.⁷² These administrative fees drive up the cost paid by incarcerated people and help mask the real cost of IFCS which is often far higher than just the advertised per-minute calling rates.

The variety of additional fees make up around 38 percent of the IFCS cost incarcerated people must pay nationally, and these additional fees are not transparent to customers and regulators. Additional fees vary by IFCS provider in both name and price. The Commission should assess and ensure these additional fees are just and reasonable, and fully transparent and understandable to incarcerated people and their families and loved ones.

D. Question 4: Should the Commission act to protect calling services for incarcerated people with communications disabilities by limited charges for inmate calling services calls involving the use of text telephones (“TTY”)?

Response: Yes, the Commission Should Act to Protect the Needs of Incarcerated People with Disabilities

The OIR asks whether the Commission should act to protect the needs of incarcerated people with disabilities.⁷³ Yes, the Commission should ensure the needs of incarcerated people with disabilities are met by limiting charges for IFCS calling involving the use of TTY.⁷⁴ Currently, the FCC sets per-minute rates for TTY-to-TTY with calls capped at 25 percent of the rates communications service providers charge for traditional inmate calling service calls.⁷⁵ The FCC also prohibits IFCS providers from collecting any charges or fees for TTY-to-voice or voice-to-TTY calls.⁷⁶ However, there

⁷² “Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry”, Prison Policy Institute, Drew Kukorowski, Peter Wagner, Leah Sakala, May 8, 2013, Footnote 60. <https://www.prisonpolicy.org/phones/pleasedeposit.html#costoffees>.

⁷³ OIR at p. 7.

⁷⁴ *Id.*

⁷⁵ See FCC 15-136, Second Report and Order and Third Further Notice of Proposed Rulemaking, November 15, 2015.

⁷⁶ Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC-15-136 at p. 118.

are other issues regarding the communications services for incarcerated people with disabilities⁷⁷ that the Commission should consider.

First, the Commission should protect the access to calling services for people with disabilities who are incarcerated. All common carriers, including IFCS companies, are required by federal law to make available the same Telecommunication Relay Services (“TRS”) that are provided to the public.⁷⁸ However, there is evidence that people with hearing disabilities who are incarcerated may not have access to telecommunications service at reasonable rates using TTYs.⁷⁹ For example, the FCC notes that “deaf and hard of hearing inmates who use TTYs have to pay more than their hearing counterparts” because “the average length of a telephone conversation using a TTY is approximately four times longer than a voice telephone conversation.”⁸⁰ The 15 minute limit on calls in incarceration facilities is unreasonably restrictive because disabled incarcerated people necessarily have longer calls.⁸¹ Many communications service providers use voice command phone systems to initiate calls to TRS, so incarcerated people with a hearing disability depend on another person or staff member to help them, further increasing the duration of a call.⁸²

The FCC has continued to express concern about incarcerated people with disabilities lacking access to telephone services that are functionally equivalent to the services available to users of traditional voice services.⁸³ The Washington Lawyers’ Committee (“WLC”), for example, claims that incarceration facilities often fail to make

⁷⁷ “Person with Disabilities” can be defined as a person with a physical or mental impairment that substantially limits one or more major life activities. In this context it constitutes those who have hearing or visual disabilities that affect their ability to communicate.

⁷⁸ Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC-15-136 at p. 112.

⁷⁹ Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC-15-136 at p. 118.

⁸⁰ FCC-15-136 at p. 110.

⁸¹ *Id.*

⁸² Andrews, Jean F. 2016. “Phone Justice for Deaf Prisoners: TTY or VP?” Deaf In Prison (blog). March 19, 2016. https://deafinprison.com/2016/03/19/phone_justice/.

⁸³ Second Report and Order and Third Further Notice of Proposed Rulemaking, FCC-15-136 at p. 111.

TRS and TTY available to incarcerated people.⁸⁴ Similarly, Helping Educate to Advance the Rights of the Deaf (“HEARD”) asserts that “deaf prisoners in several states have had no telecommunications access for several years, while deaf detainees often spend their entire time in jail with no telecommunication.”⁸⁵ According to the Rosen Bien Galvan & Grunfeld (“RBGG”) law firm, its clients “routinely report that their access even to outdated and disfavored [TTYs], particularly in county jail facilities, is limited to nonexistent and that their ability to communicate with loved ones and attorneys is thereby impaired.”⁸⁶ RBGG further asserts that, even when incarceration facilities have TTYs, “...they are often not actually available to our clients because they are broken, because staff does not know they exist, or because staff does not know how to use the machines.”⁸⁷

IFCS providers have a legal obligation to ensure the availability of calling services to people with disabilities in incarceration facilities.⁸⁸ The Commission should ensure affordable access to TTY and more advanced forms of TRS, including Video Relay Service (“VRS”), and Internet Provider (“IP”) Relay services. The U.S. Department of Justice has made clear in its regulations implementing Title II of the ADA that prohibiting discrimination against individuals with disabilities by state and local governments extends to activities of state and local correctional facilities.⁸⁹

The Commission should require IFCS companies to provide modernized equipment for calls in California’s incarceration facilities. For example, incarcerated people with disabilities have voiced concerns that using a Telecommunication Device for

⁸⁴ FCC-15-16, WLC Second Further Notice of Proposed Rulemaking (FNPRM) Comments at p. 2.

⁸⁵ FCC-15-136, HEARD Second FNPRM Comments at p. 1-2.

⁸⁶ FCC-15-136, RBGG Second FNPRM Comments at p. 3.

⁸⁷ Id.

⁸⁸ See 42 U.S.C. § 12131 et seq. Title II of the ADA prohibits discrimination against individuals with disabilities by state and local governments.

⁸⁹ 28 CFR § 35.152; see also *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) (Title II of the ADA covers inmates in state prisons).

the Deaf (“TDD”)⁹⁰ is unsatisfactory because “our family members and friends who are deaf, are no longer using the obsolete TDD system.”⁹¹ New equipment can decrease the cost of calls for incarcerated people with disabilities by decreasing the average calling time. Modern technologies (such as VRS) that provide video calls can mitigate the increased call times, delays, and issues related to TTY/TRS stated previously.

E. Additional Issues: The Commission Should Review IFCS Companies’ Privacy Policies and Practices

The Commission should examine the privacy policies and practices of IFCS companies. Incarcerated people are particularly at risk of privacy violations with potentially detrimental impacts. For example, between 2015 and 2018, an Orange County Sheriff’s Office’s jailhouse recording system illegally captured, and deputies illegally listened to, more than 1,000 calls between inmates and their lawyers.⁹² Since police and police departments work closely with district attorneys to prosecute cases, privacy violations can threaten an individual’s civil rights, by violating the attorney/client privilege among other things.

The Commission has the authority to regulate telephone companies privacy practices pursuant to Pub. Util. Code § 7906 which requires that the Commission regularly examine whether telephone corporations are “taking adequate steps to insure the privacy of communications” over their network.⁹³ Additionally, Pub. Util. Code § 2896 requires telephone corporations to provide customer service that includes “[s]ufficient information upon which to make informed choices among

⁹⁰ “The term ‘TDD’ means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.” 47 U.S.C. § 225(a)(2).

⁹¹ See Letters from Daniel Blanco, Tyson Hopper, Juan Rivera, Allen Fisher, inmates at California Substance Abuse Treatment Facility, to FCC, WC Docket No. 12-375.

⁹² Moxley, R. Scott. 2018. “OCDA Cuts Deal to Thwart Public Hearing into Jail Phone Surveillance Scandal.” OC Weekly, September 12, 2018. <https://ocweekly.com/ocda-cuts-deal-to-thwart-public-hearing-into-jail-phone-surveillance-scandal/>.

⁹³ Pub. Util. Code § 7906.

telecommunications services and providers, including, but not limited to, information regarding the provider's ...terms and conditions of service."⁹⁴ Therefore, this proceeding should examine privacy policies, and any related terms and conditions, of companies providing calling services to people who are incarcerated.

III. CONCLUSION

The Commission has jurisdiction over companies providing intrastate telecommunication services and a statutory mandate to ensure that communication rates, terms, and services are just, and reasonable to all California customers, including people who are incarcerated and their families. Cal Advocates urges the Commission to set rate caps for intrastate IFCS calling services, including video calls. The Commission also should exercise its authority to limit the types of additional and hidden fees charged for IFCS used by incarcerated people. More importantly, the Commission should take concrete steps to protect incarcerated people with disabilities by limiting charges for inmate calling services calls involving the use of TTY.

Respectfully submitted,

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⁹⁴ Pub. Util. Code § 2896.